Supreme Court, U.S.
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No. 97-

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

STATE OF FLORIDA, DEPARTMENT OF BUSINESS AND PROFESSIONAL, etc., et al.,
Petitioners.

v.

ROCHAMBEAU WINES AND LIQUORS, INC., et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a State has a right of action in a federal court to enforce the prohibitions of the Webb-Kenyon Act, 27 U.S.C. § 122, against a direct foreign seller of alcoholic beverages whose direct sales to the State violate that State's laws, the Twenty-First Amendment to the United States Constitution and the Webb-Kenyon Act?

PARTIES TO THE PROCEEDINGS

The Petitioners in this case, Appellants below, are the State of Florida, Department of Business and Professional Regulation, and Robert A. Butterworth, Attorney General of the State of Florida. The Respondents in this case, Appellees below, are Rochambeau Wines and Liquors, The California Wine Club, Passport Gift Company, Inc., d/b/a Passport Wine Club, and, Wine Club Santa Ana.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The State of Florida, Department of Business and Professional Regulation, and Robert A. Butterworth, Attorney General of the State of Florida, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals. Pet.App. i-xvii, is reported at 125 F.3rd 1399. The opinion of the district court, an unreported decision, is Pet.App. xviii-xxvi.

JURISDICTION

The court of appeals filed its opinion on October 24, 1997. Pet.App. i-xvii. The jurisdiction of this Court is invoked under 28 U.S.C.§ 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Twenty-First Amendment, Section 2, to the United States Constitution, provides:

> "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violations of the laws therein, is hereby prohibited."

2. The Wilson Act, 27 U.S.C. §121, provides:

> All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids had ben produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

3. The Webb-Kenyon Act, 27 U.S.C. §122, provides:

> The shipment of transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented or other intoxicating liquor of any

kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof which said spirituous, vinous, malted, fermented or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof is hereby prohibited.

4. 28 U.S.C. §1331, provides:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.

5. 28 U.S.C. §1337(a), provides:

The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade or commerce against restraints and monopolies.

STATEMENT OF THE CASE

Petitioners brought this case in the District Court for the Northern District of Florida, in order to seek injunctive relief to halt the illegal interstate bootlegging of alcoholic beverages into Florida. The Petitioners brought the action under the federal jurisdictional statutes of 28 U.S.C. §1331 and 28 U.S.C. §1337(a). Petitioners asserted that the Webb-Kenyon Act, 27 U.S.C. §122, and the 21st Amendment to the United States Constitution, provided the Petitioners with an injunctive/ enforcement right of action in the federal courts. Petitioners asserted that this injunctive/enforcement right

provided the Petitioners with a federal forum to totally prohibit the interstate commerce of alcoholic beverages not in compliance with Florida law as permitted by the Wilson Act, the Webb-Kenyon Act and the 21st Amendment.

The Respondents filed a motion to dismiss in response to the Petitioners' complaint. Respondents raised a number of questions in their assertion that the Petitioners had not "raise a federal question" in their Complaint. The questions raised were: 1) did the Petitioners fail to assert a federal claim on the face of the Complaint, as opposed to a purely state law claim?; and, 2) did the federal laws under which the Petitioners claim a federal question arises provide the Petitioners with a federal right of action permitting a claim for relief in Federal Court?

The District Court set a hearing on the Respondents' Motion. Prior to the hearing, Petitioners filed supplemental authority in support of their position. Respondents later filed a response to Petitioners' supplemental authority. The District Court issued its ruling on May 3, 1996 granting Respondents' Motion to Dismiss for lack of subject matter jurisdiction. Pet. App. xvi-xxv. Final judgment dismissing the case was filed the same date. Pet. App. xxvi. Petitioners timely filed their Notice of Appeal.

On appeal, the Court of Appeals for the Eleventh Circuit, agreeing with the District Court, ruled that the Petitioners did not have an implied federal cause of action under the Webb-Kenyon Act.

The Respondents, out of state mail-order shippers, have been and are illegally selling alcoholic beverage products (hereinafter products) directly to Florida consumers, contrary to Florida law. Rochambeau Wines and Liquors (hereinafter

ROCHAMBEAU), is incorporated in and holds an alcoholic beverage license from the State of New York. Its principal place of business is at 389 Broadway, Dobbs Ferry, New York 11052, and it conducts mail-order business using telephone number (914) 693-0034. The California Wine Club (hereinafter CALIFORNIA) is incorporated in and holds an alcoholic beverage license from the State of California. Its principal place of business is at 2175 Goodyear Avenue, Suite 114, Ventura, California 93003. Passport Gift Company, Inc., d/b/a Passport Wine Club (hereinafter PASSPORT), is incorporated in and holds an alcoholic beverage license from the State of California. Its principal place of business is at 1201 Andersen Drive, Suite M, San Rafael, California 94901-9801 and it conducts mail-order business using telephone number (800) 867-9463. Wine Club Santa Ana (hereinafter SANTA ANA), is incorporated in and holds an alcoholic beverage license from the State of California. Its principal place of business is at 2110 East McFadden Avenue, Suite E, Santa Ana, California 92705. SANTA ANA conducts its mail-order business using telephone number (800) 966-5432.

The Division of Alcoholic Beverages and Tobacco (DABT) is a division of the Florida Department of Business and Professional Regulation of the State of Florida, created pursuant to Sections 20.165(2)(b) and 561.02, Florida Statutes (1994). DABT is charged with the enforcement of the Beverage Law. Section 561.02, Florida Statutes (1994).

Respondents engage in the retail sale of wine products. Respondents have created "clubs" and sell "memberships" to the members of the public. Respondents conduct their retail activities by selling to persons who become members of the

"club." These sales and deliveries of the wine products are conducted via "mail-order." The Respondents advertise their "club" memberships over the Internet, in publications, or via direct mail, distributed in Florida. These advertisements in no manner restrict the sale or delivery to persons residing within the territorial boundaries of Florida.

Through this just-described activity, Respondents are illegally selling, and bootlegging, alcoholic beverages in Florida. The Respondents are not licensed in Florida to sell their merchandise in Florida or to Florida residents directly. This advertising and absence of controls, to ensure legal sale, delivery and tax collection in this State, results in unlawful transactions involving alcoholic products and the evasion of lawful taxes imposed by Florida on alcoholic beverages lawfully sold in Florida.

On or about May 16, 1995, DABT provided written notice to each of the Respondents, via certified mail, return receipt requested, advising them that their mail-order shipment of alcoholic beverage products to Florida consumers was illegal. In the letter, DABT's Director offered to assist each Respondent to operate in compliance with Florida's Beverage Law. Each Respondent received this written notice and offer of assistance as evidenced by the signatures on the return postal receipts.

On or about July 28, 1995, an agent of DABT placed a telephone order from Leon County, Florida, with Respondents SANTA ANA and ROCHAMBEAU, to receive a mail-order shipment of products. The products were subsequently delivered directly to a consumer's residence in Leon County, Florida. The products were not registered in Florida. On or about September 11-12, 1995, an agent of

DABT placed a telephone order from Leon County, Florida, with Respondents CALIFORNIA and PASSPORT to receive a mail-order shipment of products. The products were subsequently delivered directly to a consumer's residence in Leon County, Florida. The products sold by Respondents CALIFORNIA and PASSPORT were not registered in Florida. None of the alcoholic products sold reflected the taxes lawfully imposed by Florida.

DABT contacted each of the known Respondents in an effort to get them to comply with the Florida "Beverage Law." (Chapters 561 through 568, Florida Statutes) However, the Respondents neither ceased from selling and shipping products into Florida nor responded to certified notification.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals strikes a crippling blow to law enforcement efforts in stopping the illegal flow of alcohol into Florida and other States. The Court of Appeal's ruling locks the Federal Courthouse doors to the States. The States are without a forum to invoke the Webb-Kenyon Act to stop illegal shipments of liquor.[1/]

[1/] About the same time the Court of Appeals was closing the federal courthouse door to Florida, a Florida state court judge ruled that Florida did not have "personal" jurisdiction over a like seller of alcohol to prevent, in a Florida state court, the illegal shipment of alcohol into Florida. Department of Business and Professional Regulation v. Sam's Wines & Liquors, 2nd Judicial Circuit Court, Case No. 96-3602, Amended Order Granting Motion to Dismiss dated December 8, 1997, appeal pending before the First District Court of Appeal of Florida,

Two of the cornerstones of the law enforcement effort in the prohibition of illegal interstate shipment of alcoholic beverages have been the 21st Amendment to the United States Constitution and the Webb-Kenyon Act, 27 U.S.C. § 122. Both have been viewed by the States and the Federal Government as the laws by which the States could stop the illegal shipment of alcoholic beverages into their respective states. The States believed they can utilize the Webb-Kenyon Act in either State or Federal courts to stop the illegal flow of unregulated, unlicensed and untaxed alcoholic beverages over their borders. That was until now.

A. THE STATES' ABILITY TO REGULATE THE INTERSTATE SHIPMENT OF ALCOHOLIC BEVERAGES HAS BEEN GREATLY UNDERMINED BY THE DECISION BELOW

What has been brought into question in this case is the ability of Florida, and the other States, to utilize the Federal Courts as a forum for the enforcement against the illegal shipment of alcoholic beverages into their respective States. The essence of the Court of Appeal's decision is that, while the States may enforce Webb-Kenyon in their own courts, they may not use the Federal Courts to enforce this Federal

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Consolidated Case No. 97-3828, 97-3937 and 97-4060. Pet App. xvii-xxx. After the District Court's decision in this case, the Petitioners had brought the state court enforcement action against other direct marketers, who like the Respondents, illegally sold alcoholic beverages directly to Florida residents. Consequently, Florida knows who is illegally selling and shipping alcoholic beverages to Florida residents but is now without a forum within which to enforce its Beverage Laws to stop such illegal sales.

Act.

The Petitioners submit that the Court of Appeals ruling that the Webb-Kenyon Act does not provide a cause of action to the States to utilize the Federal Courts to halt the clearly illegal interstate shipment of alcoholic beverages into the States eviscerates the intent of Congress and greatly hampers the State's law enforcement capabilities. In conjunction with the State court ruling that Florida does not have "personal jurisdiction" over the Respondents, Florida is left without any forum to reach those beyond its borders who are purposefully violating not only Florida's Beverage Laws, but also the 21st Amendment and the Webb-Kenyon Act.

The Petitioners believe the Court of Appeals did not understand the import of the situation and read too narrowly this Court's private right of action case law when the State's right of action would involve a law enforcement effort and, in particular, the enforcement of an act of Congress. There is no question that Respondents' business activities in this case violate Florida's beverage laws. There is no question that the 21st Amendment makes the violation of the State laws a violation of the Constitution. Furthermore, the violation of the state beverage laws is prohibited under the Webb-Kenyon Act. There is no question that the Respondents have violated both the 21st Amendment and the Webb-Kenyon Act.

The result of the Court of Appeal's decision is that Florida has before it a clear violation of its and Congress' laws yet Florida has no federal, and maybe no State, forum to enforce those prohibitions. By the mere ability to engage in commerce long distance and without the commercial infrastructure that was required for many years, the States have lost their ability to have practical enforcement of its

alcoholic beverage laws.

The Respondents are foreign corporations that have no physical locations in Florida. Respondents use commercial shippers like United Parcel Service (UPS) and Federal Express (FedEx) to ship their products to Florida and the other States. Respondents claim they are immune from reach so the States had better target UPS and FedEx since they possess the illegal alcohol inside of the States. The obvious conclusion is that it is up to the States to stop and search each and every truck, train or airplane to see if it contains illegal alcohol.

But does UPS or FedEx even know that? Some shippers of alcoholic beverages already mask what is contained in the shipping cartons. Sellers of alcoholic beverages can easily go to a general shipping agent, like Mail Boxes, Etc., and have their packages wrapped and picked up by UPS. Florida even knows of some companies which have been set up strictly to ship alcoholic beverages and mask the true identity of the contents to the shipping company.

B. STATES HAVE HISTORICALLY HAD ABSOLUTE REGULATION OF THE SALE, MANUFACTURE AND DISTRIBUTION OF ALCOHOLIC BEVERAGES WITHIN THEIR BOUNDARIES

Only two "parties" have historically ever had the power to regulate the manufacture, sale, transportation and use of alcoholic beverages: the United States Government and the Fifty States. Congress has long maintained the power to regulate the trade of liquor (i.e. Prohibition; tax laws; Alcohol, Tobacco & Firearms). Clark Distilling Company v. Western Maryland Railway Company, 242 U.S. 311 (1917).

This Court has long held that the enactment of the 21st Amendment did not totally divest Congress of its interstate commerce powers in the regulation of alcoholic beverages. See, e.g., Brown-Foreman Distillers v. New York State Liquor Authority, 476 U.S. 573, 584 (1986); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984); Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 41-42 (1966); Hostetter v. Idlewild Bon Voyage Liquor Corporation, 377 U.S. 324, 331-333 (1964). Thus, the United States still maintains considerable power over the regulation of alcoholic beverages.

The only question is whether there has been an alteration of the Commerce Clause by the 21st Amendment, or an act of Congress, to allow state regulation of the interstate shipment of alcoholic beverages? As the following will clearly show, the enactment of the 21st Amendment and the Webb-Kenyon Act gave to the States very powerful weapons to stop the illegal flow of alcoholic beverages into the States without the restrictions the Commerce Clause would normally place on the States' regulation of interstate commerce. Now the use of these laws is threatened.

1. PRE WEBB-KENYON

From the very beginnings of the United States, it was thought to be common knowledge that the regulation of alcoholic beverages was a matter of state concern and such state regulation, even total bans or criminal prosecutions, was thought to be consistent with, and not violative of, the Commerce Clause to the U.S. Constitution. The early major case was that of In the License Cases, 46 U.S. (5 How.) 504

(1847)[2]/. There, this Court recognized the power of the states to regulate alcoholic beverages within their boundaries without restriction from the Commerce Clause. Id., at 579, 586.

However, the long held belief of state regulation changed with this Court's decision of Leisy v. Hardin, 135 U.S. 10 (1890). There, this Court retreated from its earlier position holding instead that no product, no matter how dangerous, could be regulated by the states without approval by Congress.

Within months of Leisy, Congress reacted by enacting the Wilson Act, 27 U.S.C. § 121. The Wilson Act, 27 U.S.C. § 121, states:

> All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

It was thought that this law would reverse Leisy and allow the state to prevent shipment into the States.

However, this Court then ruled that states could not prevent the interstate shipment of alcoholic beverages directly to private customers for personal use; the right to

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[2]/ This in fact consisted of a series of cases addressing alcoholic beverages.

receive alcohol was not affected by the Wilson Act. See, Rhodes v. Iowa, 170 U.S. 412 (1898). The legislation of many states passed to prevent shipment of alcohol into their states were held void as in conflict with the Commerce Clause as the states could not interfere with the importation of liquor until it reached its destination.[3/]

2. THE WEBB-KENYON ACT, 27 U.S.C. § 122

Next came the Webb-Kenyon Act, 27 U.S.C. §122, enacted March 1, 1913. The title of the Act as passed was "An act divesting intoxicating liquors of their interstate character in certain cases." 37 Stat. 699. The Webb-Kenyon Act, states, in pertinent part,:

> The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented or other intoxicating liquor of any kind, from one State * * * into any other State, * * * which said spirituous, vinous, malted, fermented or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State * * * **is hereby prohibited.** (e.s.)

This act was a further diminution to the states of the constitutional power of Congress to solely regulate interstate commerce in intoxicating liquors. Under the Webb-Kenyon Act the shipment or transportation in any manner or by any means of any spirituous or intoxicating liquor from one state to another to be disposed of in violation of any law of such

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[3/] It was the ground of the majority opinion of Scott v. Donald, 165 U.S. 58 (1897), that the state laws discriminated between liquors produced in the state and those produced outside of the state.

state is prohibited. Each state is left free to enact such laws relating to the traffic in intoxicating liquor as it may desire.[4/]

While many questions arose over the Webb-Kenyon Act, including its constitutionality, one of the points raised was the effect Webb-Kenyon had on the Commerce Clause and the states' regulation of liquor. The leading case first interpreting the Webb-Kenyon Act was Clark Distilling Company v. Western Maryland Ry. Co., 242 U.S. 311 (1917). The case involved a legislation act of West Virginia which forbade all shipments of intoxicating liquor into the state whether for personal use or otherwise. The distilling company offered for transportation into the state a shipment of intoxicating liquor which the defendant railway refused to accept and the plaintiff brought its action for damages.

In response to the argument that the Commerce Clause prevailed, this Court held that the Webb-Kenyon Act operated to give effect to the prohibition of the West Virginia law in respect to liquors shipped into the state for personal use by withdrawing from such shipments the immunity of interstate commerce and to forbid the shipment or transportation into the state of liquors intended to be received or possessed there for personal use contrary to such state

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4/ Webb-Kenyon, in its original drafted form, contained the same language that was used in the Wilson Act to prevent discrimination against out-of-state products. See 49 Cong.Rec. 699, 62 Cong. 3d Sess (1913). However, in the act as finally passed the restrictive language does not appear. Its omission seems important. It shows an intent to give the states an entirely free hand in regulating the importation and transportation of liquor.

prohibition. Clark Distilling 242 U.S., at 322-325. It was further held that the Webb-Kenyon Act was a legitimate exercise of the power of Congress under the Commerce Clause, and that power, in the case of intoxicants, because of their character extends to the total prohibition of their transports in interstate commerce, and necessarily includes the lesser power exercised in the Webb-Kenyon Act of adapting the regulation to the various local requirements and conditions that may be expressed in the laws of the state. Clark Distilling 242 U.S., at 325-332.

Thus, Clark Distilling was the first of a series of cases that held that the effect of Webb-Kenyon was to remove the regulation of alcoholic beverages from the restrictions of the Commerce Clause. See, e.g. Seaboard Air Line Railway v. State of North Carolina, 245 U.S. 298 (1917); McCormick & Co. v. Brown, 286 U.S. 131 (1932).

3. PROHIBITION

The wave of temperance lead to what some historians have called the "great experiment," the total prohibition of alcoholic beverages. The 18th Amendment to the Constitution, effective January 16, 1920, was passed to so prohibit sales of liquor. The 18th Amendment did not take away the police power of the state to enforce its provisions by appropriate legislation. Section 2 of the Amendment provides that: 'The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.' National Prohibition Cases, 253 U.S. 350, (1920); United States v. Lanza, 260 U.S. 377 (1922). In Lanza, Chief Justice Taft said:

> To regard the amendment (18th) as the source of the power of the states to adopt and enforce prohibition

> measures is to take a partial and erroneous view of the matter. Save for some restrictions arising out of the Federal Constitution, chiefly the commerce clause, each state possessed that power in full measure prior to the amendment, and the probable purpose of declaring a concurrent power to be in the states was to negative any possible inference that in vesting the national government with the power of country-wide prohibition, state power would be excluded.

The question arose whether the 18th Amendment repealed Webb-Kenyon. This Court held that it did not in McCormick & Co. v. Brown, 286 U.S. 131 (1932). McCormick & Co. was a suit brought by nonresident manufacturers and wholesale dealers to restrain state officers of West Virginia from requiring the complainants to obtain permits from the state commissioner of prohibition and to pay an annual license fee of $50 before shipping certain products containing alcohol into the state to purchasers there for resale. The bill charged that the requirements of the state officers, purporting to act under state legislation, constituted an interference with interstate commerce in violation of the Commerce Clause of the Federal Constitution, and that the complainants were without remedy at law.

This Court reaffirmed the purpose of Webb-Kenyon, and, after holding that the Webb-Kenyon Act was still in force, said:

> As the prohibitory legislation of the states may thus continue to have effective operation, there is no reason for denying to the Webb-Kenyon Act its intended application **to prevent the immunity of transactions in interstate commerce from being used to impede the enforcement of the states'** valid prohibitions. (e.s.)

McCormick & Co., 286 U.S., at 141.

4. THE 21ST AMENDMENT TO THE U.S. CONSTITUTION

In 1933, this "noble experiment" was ended with the ratification of the 21st Amendment. The 21st Amendment consisted of three sections. Section 2, of the Twenty-First Amendment, adopted December 5, 1933, reads as follows:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

At about the same time Webb-Kenyon was reenacted in 1935 without any change. The Collier Act, 49 Stat. 877.

By this wording, Section 2, of the 21st Amendment, constitutionalized an exception to the normal operation of the Commerce Clause. Craig v. Boren, 429 U.S. 190, 206, (1976). As this Court has stated, that section is unique in the constitutional scheme in that it represents the only express grant of power to the states, thereby creating a fundamental restructuring of the constitutional scheme as it relates to one product: intoxicating liquors. See California v. LaRue, 409 U.S. 109, 115 (1972).

Shortly after the repeal of Prohibition, the question of its effect on state power arose. This Court stated that the 21st Amendment permitted states to regulate without fear of the Commerce Clause. State Board of Equalization v. Young's Market Co., 299 U.S. 59, 62 (1939); Indianapolis Brewing Co. v. Liquor Commission of Michigan, 305 U.S. 391, 394 (1939)[Since the 21st Amendment, "the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause"]. In Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939), this Court had before it a

challenge to the beverage laws of Kentucky. To paraphrase this Court,

> since March 1933 appellant, an Indiana corporation, has continuously received whiskey from distillers in Kentucky for direct carriage to consignees in Chicago. It has permission under the Federal Motor Carrier Act, 1935, to operate as a contract carrier, and claims the right to transport whiskey as heretofore, notwithstanding inhibitions of the Kentucky Alcoholic Beverage Control Law approved March 7, 1938. By this proceeding it seeks to restrain officers of [Kentucky] from enforcing the contraband and penal provisions of that enactment.
> The bill charges that to enforce the Control Law would impair appellant's rights under the Commerce Clause, Federal Constitution, U.S.C.A.Const. art. 1, s 8, cl. 3, and deprive it of the Due Process and Equal Protection guaranteed by the Fourteenth Amendment.
> The Statute is a long, comprehensive measure (123 sections) designed rigidly to regulate the production and distribution of alcoholic beverages through means of licenses and otherwise. The manifest purpose is to channelize the traffic, minimize the commonly attendant evils; also to facilitate the collection of revenue. To this end manufacture, sale, transportation, and possession are permitted only under carefully prescribed conditions and subject to constant control by the state. Every phase of the traffic is declared illegal unless definitely allowed. The property becomes contraband upon failure to observe the statutory requirement and whenever found in unauthorized possession.

Ziffrin, Inc.,308 U.S., at 133-134.

This Court, after a detailed statement of the facts, stated the now long held effect of the 21st Amendment:

> The Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, **unfettered by the Commerce Clause**. Without doubt a state may absolutely prohibit the manufacture of intoxicants, their

> transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them.
>
> Having power absolutely to prohibit manufacture, sale, transportation, or possession of intoxicants, was it permissible for Kentucky to permit these things only under definitely prescribed conditions. Former opinions here make an affirmative answer imperative. The greater power includes the less. The state may protect her people against evil incident to intoxicants, and may exercise large discretion as to means employed. (e.s.)

Ziffrin, Inc., 308 U.S., at 138-139 (citations omitted).

When it comes to the state regulation of the sale, manufacture, transportation or use of alcoholic beverages within the boundaries of the state, this Court has **not** wavered from Ziffrin, state regulation of liquor is not limited by the Commerce Clause. California v. Washington, 358 U.S. 64 (1958); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330 (1964); Joseph E. Seagram & Sons, Inc v. Hostetter, 384 U.S. 35, 42 (1966); California Retail Liquor Dealers Association v. Midcal Aluminum, 445 U.S. 97, 110 (1980)["The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."]; North Dakota v. United States, 495 U.S. 423 (1990)[same]. The states have the "absolute power under the twenty-first amendment to prohibit totally the sale of liquor within its boundaries...." New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 715(1981).

C. THE DECISION BELOW CONFLICTS WITH A DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS

The Petitioners would assert that the decision below conflicts with the Fourth Circuit Court of Appeals decision of West Virginia v. Adams Express Co., 219 F. 794 (4th Cir. 1915). That case is nearly identical to this case on the facts. In Adams Express, a citizen of West Virginia purchased beer from a seller in Cincinnati, Ohio, and had the Cincinnati seller directly ship the beer to the West Virginia citizen using Adams Express. West Virginia sought to stop this illegal trade into West Virginia by bringing suit in state court against Adams Express to enjoin the transportation of the unlawful alcohol.[5/] The state court enjoined Adams Express which then removed the case to the Federal District Court. The district court dissolved the injunction and then dismissed the suit. The appeal to the Fourth Circuit then ensued.

The Fourth Circuit stated the two issues before it as whether:

> the state may forbid the sale of liquor in its borders and make the delivery by a carrier a sale at the place of delivery; and whether the Congress can prohibit the transportation in the state by the common carrier of liquor so to be delivered contrary to the law of the

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[5/] The only factual difference between these two cases is that Florida wanted to directly stop the seller from violating the law where West Virginia sought to stop the trade by suing Adams Express, the shipping agent.

state.[6]/

Id., 219 F., at 797. That court believed both questions were to be answered in the affirmative. Id.

The Fourth Circuit first found that the Wilson Act, 27 U.S.C. § 121 withdrew the protection of interstate commerce from liquor. Adams Express, 214 F., at 810. It then ruled that the Webb-Kenyon Act was enacted as the result of a

> growing public conviction that it was an abuse of interstate commerce that even under the Wilson Bill **liquor dealers in one state were protected in impairing or defeating the efforts of another state to root out or to minimize the evil of the use of liquor as a beverage.** (e.s.)

Id. Thus, the Fourth Circuit concluded Webb-Kenyon:

> [P]rohibits the shipment or transportation of liquor from one state into another, not only when it is intended to be sold in violation of any law of such state, but when it is to be received or possessed or in

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[6]/ The Fourth Circuit was not impressed by the means of solicitation to secure sales of the alcoholic beverages, stating:

> It makes no difference that the United States mail was used for the solicitation. The federal government does not protect those who use its mails to thwart the police regulations of a state made for the conservation of the welfare of its citizens. The use of the mail is a mere incident in carrying out the illegal act, and affords no more protection in a case like this than a like use of the mails to promote a criminal conspiracy, or to perpetrate a murder by poison, or to solicit contributions of office holders in violation of the civil service law, or to obtain goods under false pretenses. . .

Adams Express, 219 F., at 800, citing In re Palliser, 136 U.S. 257 (1890); United States v. Thayer, 209 U.S. 39 (1908).

any manner used in violation of the state law.

Id. In conclusion, the court stated:

> This is a direct recognition of the right of the state to prohibit the receipt or delivery as well as the possession and use of liquor, without trespassing upon the power of Congress to regulate interstate commerce.

Id.

The import of this decision, and the strong language utilized by the Fourth Circuit Court of Appeals, was that the States had the right to stop the interstate sales and shipment of alcoholic beverages into their territories. There is nothing in the Adams Express decision to imply that the "forum" used by the States to clearly restrict the illegal sales of alcoholic beverages could "only" be the state courts.

The decision of the Eleventh Circuit Court of Appeals expressly bars the States from using federal courts in their never ending battle to control the sale, distribution manufacture and use of alcoholic beverages within their respective boundaries. Stated otherwise, while the Fourth Circuit recognized the clear "right of the state to prohibit the receipt or delivery as well as the possession and use of liquor," the Eleventh Circuit has barred the exercise of that right in a federal court. The Court of Appeals decision, thus, leaves in place the very situation the Fourth Circuit reasoned Webb-Kenyon was enacted to eliminate: the fact that "liquor dealers in one state [are] protected in impairing or defeating the efforts of another state to root out or to minimize the evil of the use of liquor as a beverage."

The Petitioners would assert that the Federal Court may be the only forum in which to prohibit sellers like the Respondents from violating Florida law, especially in light of the Florida state trial court decision below. By not being able to directly enforce the Webb-Kenyon Act in the Federal Courts, Florida and the States lose the ability to reach the only party that can truly be stopped from violating State and Federal Law, the direct marketer/seller of alcoholic beverages. Unless the States can reach the Respondents, the Respondents are free to violate the law with impunity.[7]/

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[7]/ It is highly questionable that home state of the foreign seller will allow Florida to enforce its law in the home State's courts.

CONCLUSION

For these reasons, the requested Writ of Certiorari should be granted to review and reverse the instant decision of the Court of Appeal.

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FLORIDA DEPARTMENT OF BUSINESS REGULATION and Robert Butterworth, Plaintiffs-Appellants,

v.

ZACHY'S WINE AND LIQUOR, INC., et al., Defendants,
Rochambeau Wines and Liquors, Inc., et al., Defendants-Appellees.

No. 96-2772.

United States Court of Appeals,
Eleventh Circuit.

Oct. 24, 1997.

State brought action seeking to enjoin four out-of-state, mail-order wine distributors from violating state's liquor laws. The United States District Court for the Northern District of Florida, No. 95-40462-WS, William Stafford, J., dismissed for lack of subject matter jurisdiction, and state appealed. The Court of Appeals, Dubina, Circuit Judge, held that Webb-Kenyon Act, which prohibits shipment or transportation of liquor into state if liquor is intended to be received, possessed, sold, or otherwise used in violation of receiving state's law, does not provide states with implied federal cause of action.

Affirmed.

Eric J. Taylor, Department of Legal Affairs, Tallahassee, FL, Thomas A. Klein, Denis Dean, Tallahassee, FL, for Plaintiffs-Appellants.

Roy C. Young, Tallahassee, FL, Robert T. Wright, Jonathan Cohen, David S. Goldstein, Shutts & Bowen, Miami, FL, Kenneth R. Hartmann, Kozyak, Tropin & Throckmorton, Miami, FL, for Defendants-Appellees.

Mark B. Stern, John S. Koppel, U.S. Department of Justice, Appellate Staff, Civil Division, Washington, DC, for Amicus USA.

Appeal from the United States District Court for the Northern District of Florida.

Before ANDERSON, DUBINA and CARNES, Circuit Judges.

DUBINA, Circuit Judge:

The State of Florida ("State") brought an action seeking to enjoin four out-of-state, mail-order wine distributors from

violating Florida's liquor laws, Fla. Stat. Ann. § 561 et seq. The district court dismissed the complaint for lack of subject matter jurisdiction. We affirm.

I. STATEMENT OF THE CASE

Defendants/appellees ("defendants") are four out-of-state[1]/ wine retailers who solicit direct mail-order business from Florida residents. The State contends that this practice violates Florida's Beverage Laws, Fla. Stat. Ann. § 561 et seq. Those laws provide that alcoholic beverages imported into Florida must be shipped to a licensed, in-state manufacturer or distributor and may be sold only by licensed, in-state vendors. Fla. Stat. Ann. §§ 561.14, 561.54, 561.57. The Florida Division of Alcoholic Beverages and Tobacco notified defendants of the alleged violations, but defendants did not alter their business practices.

The State filed a five-count complaint against defendants seeking an injunction compelling defendants to comply with the licensing requirements of the Florida Beverage Laws. The State also alleged state law claims for payment of

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[1]/ Three of the defendants are located in California; one is located in New York.

unpaid excise taxes, sales taxes, and license fees. The State invoked jurisdiction under 28 U.S.C. § 1331, which provides that district courts shall have jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States, and 28 U.S.C. § 1337, which provides that district courts shall have jurisdiction over actions arising under acts of Congress regulating commerce. Specifically, the State claimed that its federal claim arose under the Twenty-first Amendment, the Wilson Act, 27 U.S.C. § 121, and/or the Webb-Kenyon Act, 27 U.S.C. § 122. The State contended that the district court had supplemental jurisdiction over the Florida state law claims pursuant to 28 U.S.C. § 1367(a).

Defendants moved to dismiss for lack of subject matter jurisdiction. The district court granted the motion, finding that neither the Twenty-first Amendment, the Wilson Act, nor the Webb-Kenyon Act supplied a federal right of action for failure to comply with state liquor laws. In the absence of a federal claim, the district court concluded that it lacked subject matter jurisdiction to hear the case. The State then perfected this appeal.[2/]

[2/] In addition to the parties' briefs, we have the benefit of an amicus brief from the United States and an

On appeal the State argues that the Webb-Kenyon Act provides the State with a federal cause of action to enjoin the direct shipment of alcoholic beverages to Florida residents by out-of-state distributors in violation of state liquor laws. The State abandons its reliance on the Twenty-first Amendment and the Wilson Act.

II. DISCUSSION

A. Background of the Webb-Kenyon Act

"Since the founding of our Republic, power over regulation of liquor has ebbed and flowed between the federal government and the states." Castlewood Int'l Corp. v. Simon, 596 F.2d 638, 641 (5th Cir.1979). In The License Cases, 46 U.S. (5 How.) 504, 579, 12 L.Ed. 256 (1847), the Supreme Court recognized broad state authority to regulate alcohol, noting that states were free from the implied restrictions of the Commerce Clause. U.S. Const. art.I, § 8, cl.3. In 1890, however, the Court struck down an Iowa law regulating the sale of liquor shipped from out-of-state. Leisy v. Hardin, 135 U.S.

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amicus brief from the National Alcohol Beverage Control Association, Inc., and the National Conference of State Liquor Administrators. Both amicus briefs support the State's position.

100, 10 S.Ct. 681, 34 L.Ed. 128 (1890). The Court held that the law ran afoul of the Commerce Clause's grant to Congress of exclusive authority to regulate commerce among the states. In response to Leisy, Congress passed the Wilson Act later that same year. The Wilson Act provided that alcoholic beverages shipped from out-of-state became subject to the laws of the receiving state upon arrival in that state.[3/]

The Supreme Court held that the Wilson Act was constitutional. See In re Rahrer, 140 U.S. 545, 11 S.Ct. 865, 35 L.Ed. 572 (1891). However, the Court later ruled that the Wilson Act did not authorize application of state regulatory laws to liquor still in transit, and did not allow states to prohibit individuals from ordering liquor for personal consumption from

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[3/] The Wilson Act specifically provides:

> All ... intoxicating liquors ... transported into any State or Territory ... for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such ... liquors had been produced in such State or Territory....

27 U.S.C. § 121.

out-of- state vendors. See Rhodes v. Iowa, 170 U.S. 412, 18 S.Ct. 664, 42 L.Ed. 1088 (1898); Vance v. W.A. Vandercook Co., 170 U.S. 438, 18 S.Ct. 674, 42 L.Ed. 1100 (1898).

In 1913, Congress closed these loopholes by passing the Webb-Kenyon Act, which was entitled "An act divesting intoxicating liquors of their interstate character in certain cases." The Webb-Kenyon Act prohibits the shipment or transportation of liquor into a state if the liquor is intended to be received, possessed, sold, or otherwise used in violation of the law of the receiving state. The Act specifically provides:

> The shipment or transportation, ... of any ... intoxicating liquor of any kind, from one State, ... into any other State ... which ... intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, ... is hereby prohibited.

27 U.S.C. § 122. In James Clark Distilling Co. v. Western Md. Ry. Co., 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326 (1917), the Court stated that the purpose of the Webb-Kenyon Act "was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught." 242 U.S. at 324, 37 S.Ct. at 184.

The Twenty-first Amendment was ratified in 1933. In addition to repealing Prohibition, the Twenty-first Amendment in effect constitutionalizes the Webb- Kenyon Act. Section 2 of the Twenty-first Amendment "reserves to the States power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause." Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712, 104 S.Ct. 2694, 2707, 81 L.Ed.2d 580 (1984) (citations and quotations omitted). Section 2 "represents the only express grant of power to the states, thereby creating a fundamental restructuring of the constitutional scheme as it relates to one product--intoxicating liquors." Castlewood Int'l Corp., 596 F.2d at 642.

B. Whether Florida has an implied right of action

The Webb-Kenyon Act does not explicitly provide that states may bring a cause of action in federal court to enforce its terms. Nevertheless, the State contends that it has an implied federal right of action under the Webb-Kenyon Act. The district court disagreed and so do we.

There is very little case law on this subject. One reported decision addresses this issue directly and was heavily relied upon by the district court. See Georgia v. Wenger, 94

F.Supp. 976 (E.D.Ill.1950), aff'd, 187 F.2d 285 (7th Cir.1951).[4]/ In Wenger, the State of Georgia brought a suit for damages in federal district court against an Illinois defendant who allegedly had shipped liquor to Georgia without paying Georgia taxes and warehouse charges. The defendant moved to dismiss for lack of jurisdiction, arguing that there was no federal question because Georgia's claims arose under state law. Georgia argued that it had a federal right under the Webb-Kenyon Act and the Twenty-first Amendment. The district court agreed with the defendant and found no right of action.

The district court in Wenger outlined the history and purpose of both the Twenty-first Amendment and the Webb-Kenyon Act. The district court noted that in passing the Twenty-first Amendment, Congress, the states, and the people of the United States intended "to place the states in position to put their respective policies relating to intoxicants into effect by state legislation without hindrance due to constitutional limitation applicable to ordinary articles of commerce." Wenger, 94 F.Supp. at 982. The Twenty-first Amendment also

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[4] Wenger predates modern implied right of action analysis, discussed infra; however, it is useful because it is on point.

"anticipated and rendered harmless a possible repeal of the Webb-Kenyon Act." Id. The district court stated that it found no authority that the Webb-Kenyon Act nor the Twenty-first Amendment gives rise to any legal right which will sustain a cause of action for damages. Accordingly, the district court concluded:

> Both by history and by judicial interpretation in the light of history the intended scope and purpose of [the Twenty-first Amendment and the Webb-Kenyon Act] is to divest liquor in interstate commerce of its interstate character so as to deprive it of all immunity from state control. Neither serves to give the states enforceable civil rights but only serves as enabling authority for broader state legislation relating to intoxicants.

Id. at 981-82. The Seventh Circuit affirmed, stating that the district court "correctly held that no cause of action of the nature asserted here arose under the [Twenty-first] Amendment or the Webb-Kenyon Act." Wenger, 187 F.2d at 287.

The State contends that Wenger is distinguishable because it involved a claim for monetary damages under the Webb-Kenyon Act, and here, by contrast, the State seeks injunctive relief only.[5/] This is a distinction without a

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[5/] We note, however, that even though the State seeks injunctive relief only under the Webb-Kenyon Act, its state law claims are for monetary damages.

difference. The analytical starting point is ascertaining whether Florida has an independent right of action under the Webb-Kenyon Act. If the State does, then--and only then--does the court reach the question of what remedies are available to the State. See Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60, 65-66, 112 S.Ct. 1028, 1032, 117 L.Ed.2d 208 (1992)("As we have often stated, the question of what remedies are available under a statute that provides a private right of action is analytically distinct from the issue of whether such a right exists in the first place.")(quotation and citation omitted). Thus, we do not believe Wenger is distinguishable merely because it involved a claim for damages.[6]

The United States, as amicus, argues that West Virginia v. Adams Express Co., 219 F. 794 (4th Cir.1915), is a more appropriate precedent. In Adams Express, West Virginia brought an action in state court to enjoin Ohio defendants from direct-mailing liquor to West Virginia residents in violation of state law. The defendants removed the action to federal district

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[6]/ During oral argument, in response to a panel member's question regarding whether Wenger is distinguishable, counsel for the State was unable to provide the court with an adequate response other than the one mentioned in the brief and discussed infra.

court. The district court denied the injunction on the ground that the state law was invalid under the Commerce Clause. The Fourth Circuit reversed, holding that the Webb-Kenyon Act was "a direct recognition of the right of the state to prohibit the receipt or delivery as well as the possession and use of liquor, without trespassing upon the power of Congress to regulate interstate commerce." Id. at 801. Consequently, the state law was valid and entitled West Virginia to injunctive relief.

The State argues that Adams Express indicates that the Webb-Kenyon Act permits states to enforce their liquor laws in federal court. The Adams Express court, however, did not state that West Virginia had a right of action under Webb-Kenyon itself. The district court noted that the defendants invoked removal jurisdiction because "the suit is one arising under the Constitution or laws of the United States." 219 F. 331 (S.D.W.Va.1914). The court, unfortunately, did not elaborate because the state did not contest this basis for jurisdiction. Thus, the basis for subject matter jurisdiction in that case remains unclear.

In considering the State's contention that it has an implied right of action, we must consider the Supreme Court's pronouncement on this topic. The Court has set forth four

relevant factors to determine whether a statute implies a right of action:

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted"--that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975)(quotation & citations omitted). Subsequent decisions have clarified that the most important factor is whether Congress intended to create a cause of action. See e.g., Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15-16, 100 S.Ct. 242, 245, 62 L.Ed.2d 146 (1979); Collins v. FMHA- USDA, 105 F.3d 1366, 1367-68 (11th Cir.), cert. denied, --- U.S. ----, 117 S.Ct. 2528, 138 L.Ed.2d 1028 (1997). "Congressional intent to create a private right of action will not be presumed. There must be clear evidence of Congress's intent to create a cause of action." Baggett v. First Nat'l Bank of Gainesville, 117 F.3d 1342, 1345 (11th Cir.1997)(citing Touche Ross & Co. v. Redington, 442 U.S. 560, 570, 99 S.Ct.

2479, 2486, 61 L.Ed.2d 82 (1979)). The State and its amici argue that application of this analysis compels a ruling in Florida's favor. We disagree.

In considering the four Cort v. Ash factors, only the first one favors Florida's position: the Webb-Kenyon Act was enacted for the benefit of the states. The most important factor--Congressional intent--weighs against the State. The State cites no affirmative evidence that Congress intended the Act to create an independent cause of action enforceable in federal court. Indeed, the United States concedes in its amicus brief that "there is no express legislative history confirming the right of states to enforce Webb- Kenyon, ..." Br. of United States at 13.

Nor does it appear that the legislative history implicitly supports an independent cause of action under Webb-Kenyon. The United States' brief, for example, quotes one of the Act's sponsors, Senator Kenyon, as stating that the Act's "purpose, and its only purpose, is to remove the impediment existing to the States in the exercise of their police powers regulating the traffic or control of intoxicating liquors within their borders." Br. of United States at 5 (emphasis added). If the only purpose of the Act was to grant states authority to exercise their own

police powers, it follows that the Act did not also create a federal cause of action.

In addition, Congress passed the Reed Amendment in 1917, which originally banned the advertisement of liquor and provided for federal criminal enforcement of the Webb-Kenyon Act. Congress intended to "ma[ke] the liquor traffic a Federal offense in certain cases, instead of merely subjecting that traffic to the operation of State laws." H.R.Rep. No. 74-1258, at 3 (1935). From 1919 to 1933, the Webb-Kenyon Act and the Reed Amendment were superseded by the Prohibition laws. But in 1933, the Twenty-first Amendment became effective, ending Prohibition, and effectively constitutionalizing the Webb- Kenyon Act. In 1934, Congress amended the Reed Amendment to delete the provisions banning the advertising of liquor.

In 1936, Congress enacted the "Liquor Enforcement Act," which was an act "To Enforce the Twenty-First Amendment to the Constitution." See H.R. 8368, 74th Cong. (1936); 49 Stat.1928, ch. 815 (June 25, 1936). Section 3 of the new act made it illegal to import liquor into any state if (1) the state required a permit for the importation of the liquor, and the liquor was not accompanied by a permit, or (2) the state

banned the importation of alcohol altogether. See H.R. 8368, 7th Cong. § 3 (1936), codified at 18 U.S.C. § 1262. Section 9 of the new act repealed the Reed Amendment. See H.R. 8368, 7th Cong. § 9 (1936).

According to the committee report accompanying the new act, Congress intended to "relieve the States of federally imposed prohibition," H.R.Rep. No. 74-1258, at 4, and "conform [federal law] to the intent of the twenty-first amendment, that is, to avoid Federal prohibition laws which give the States more protection than they want." Id. at 8. Congress designed a system whereby

> the regulation of the liquor problem is to be left to the States, with the assurance that the Federal Government will afford them affirmative protection against violations directed from outside their borders.

H.R. Rep. 74-258, at 4. The idea was that if states provided the federal government with clear indications of what they wanted to keep out, the federal government would criminalize the importation of such items into the objecting states. See id. at 5.

The legislative history of the Webb-Kenyon Act demonstrates that if Congress had intended to provide a civil remedy for violations of the Act, then it could have done so

explicitly, as it did with criminal sanctions. The legislative history of the Reed Amendment, as well as the Webb-Kenyon Act, is ambiguous and is not "clear evidence" of an intent to create a federal civil cause of action. Baggett, 117 F.3d at 1345.[7]

Therefore, the first two Cort v. Ash factors do not support the implication of a right of action. We need not reach the other two factors. See Taylor v. Citizens Fed. Sav. & Loan Ass'n, 846 F.2d 1320, 1322 (11th Cir.1988)(citing California v. Sierra Club, 451 U.S. 287, 297-98, 101 S.Ct. 1775, 1781, 68 L.Ed.2d 101 (1981)).[8]/

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[7]/ We note that a bill was introduced in the House of Representatives last March titled, "A bill to amend the Webb-Kenyon Act to allow any state, territory, or possession of the United States to bring an action in federal court to enjoin violations of that act or to enforce the law of such state, territory, or possession with respect to such violations." This bill, which is still in committee, indicates at the very least that some members of the present Congress feel that the Congress which originally enacted the Webb-Kenyon Act did not provide states with a right of action.

[8]/ Assuming arguendo that we considered the other factors, they reinforce our conclusion that the Webb-Kenyon Act does not imply a federal cause of action. Considering the third factor, implying a right of action is not

The State urges this court to find an implied federal cause of action because it needs a federal forum to enforce its liquor laws. The Supreme Court, however, has rejected necessity as a rationale for implying a right of action. See Touche Ross & Co. v. Redington, 442 U.S. 560, 575, 99 S.Ct. 2479, 2489, 61 L.Ed.2d 82 (1979)("We need not reach the merits of the arguments concerning the 'necessity' of implying a private remedy and the proper forum for enforcement of the rights asserted by ... for we believe such inquiries have little relevance

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consistent with the underlying purpose of the Webb-Kenyon Act--to remove Commerce Clause objections to state liquor regulations. See, e.g., Craig v. Boren, 429 U.S. 190, 205-06, 97 S.Ct. 451, 461-62, 50 L.Ed.2d 397 (1976); McCormick & Co. v. Brown, 286 U.S. 131, 140-41, 52 S.Ct. 522, 526, 76 L.Ed. 1017 (1932); James Clark Distilling Co. v. Western Md. Ry. Co., 242 U.S. 311, 37 S.Ct. 180, 61 L.Ed. 326 (1917). In fact, the Wilson Act, the Webb-Kenyon Act, and the Twenty-first Amendment worked together "to reinvigorate the State's regulatory role" with respect to alcoholic beverages. Craig, 429 U.S. at 205, 97 S.Ct. at 461. The aims of restoring authority to the states and providing a constitutional footing for state regulation are not consistent with creating a federal cause of action. Finally, the last Cort v. Ash factor militates against finding an implied federal right of action because states have historically taken the lead in the regulation of alcoholic beverages.

to the decision of this case."). The State offers no clear reason why it needs a federal forum.[9/] Additionally, states have been enforcing their liquor laws against out-of-state distributors in state courts for years. See e.g., Alcohol Div. of Dept. of Finance & Tax. v. Strawbridge, 258 Ala. 384, 63 So.2d 358 (1953); State v. Ward, 361 Mo. 1236, 239 S.W.2d 313 (1951).

Finally, the State argues that Webb-Kenyon is an "assimilated" act because it subsumes state liquor laws and thereby renders the violation of those laws a breach of federal law, as well. Florida relies upon United States v. Sharpnack, 355 U.S. 286, 78 S.Ct. 291, 2 L.Ed.2d 282 (1958), in which the Court upheld the constitutionality of the Assimilative Crimes Act of 1948 ("ACA"). The ACA criminalized and provided for the prosecution of any action on a federal enclave which would constitute a crime in the state where the enclave was located.

9/ At oral argument, in response to a question about why the State insists on federal jurisdiction, counsel for the State and the United States claimed that an injunction from a federal court would have more impact than a state court injunction. We find no merit to this argument because under the Full Faith and Credit Clause, a state court must give deference to another state court's order. See U.S. Const. art. IV, § 1.

That is, the ACA "assimilated" and federalized state criminal law on federal enclaves. Sharpnack challenged the ACA's inclusion of state criminal law enacted after the passage of the ACA. The Court noted that assimilative acts often incorporate future state legislation. The Court cited several examples, including the Webb-Kenyon Act. 355 U.S. at 294, 78 S.Ct. at 296. The State argues that under Sharpnack, the Webb-Kenyon Act must be read as "federalizing" state liquor laws.

We conclude that the Webb-Kenyon Act is not an assimilated act. The issue in Sharpnack was not whether the ACA or any other statute implied a right of action, but whether the ACA was constitutional. Also, to say that a particular statute is assimilative does not answer the question of whether it implies an independent right of action.

In conclusion, we hold the State does not have an implied federal cause of action under the Webb-Kenyon Act. Because the district court properly dismissed the State's complaint for lack of subject matter jurisdiction, we affirm the district court's judgment.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

STATE OF FLORIDA, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, AND ROBERT BUTTERWORTH, ATTORNEY GENERAL OF THE STATE OF FLORIDA, DEPARTMENT OF LEGAL AFFAIRS,

Plaintiffs,

v. Case No. TA 95-40462-WS

ROCHAMBEAU WINES AND LIQUORS, INC., THE CALIFORNIA WINE CLUB, PASSPORT WINE CLUB, WINE CLUB SANTA ANA, INC., AND OTHER MAIL-ORDER SHIPPERS OF ALCOHOLIC BEVERAGES INTO FLORIDA,

Defendants.
_____/

ORDER GRANTING MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Before the court are defendants Rechambeau Wines and Liquors, Inc., The California Wine Club, Passport Wine Club and Wine Club Santa Ana, Inc.'s motion to dismiss for lack of subject matter jurisdiction (document 9) and plaintiffs' (hereafter "the State of Florida or Florida") response thereto (document 20). The State of Florida has also submitted a notice of supplemental authority (document 31) to which defendants have responded (document 32). On April 29, 1996, the court heard argument from counsel on the motion to dismiss.

I. *BACKGROUND*:

The State of Florida has filed a five count complaint against the defendants[1] alleging that defendants are shipping into and selling alcoholic beverage products in the State of Florida in violation of federal and Florida law. Document 2 at ¶ 1.1. Count I of the complaint seeks to compel defendants to comply with the licensing requirements under Florida law for the sale of alcoholic beverages. Id. at ¶¶ 5.1 - 5.14. Count II seeks to compel the payment of excise taxes and license fees due under Florida law on the products defendants have shipped into the state. Id. at ¶¶ 6.1 - 6.7. Count III alleges a claim against defendants under the Florida Deceptive and Unfair Trade Practices Act. Id. at ¶¶ 7.1 - 7.6. Count IV seeks to compel the payment of sales taxes due under Florida law on the products defendants have shipped into the state. Id. at ¶¶ 8.1 - 8.7. Count V seeks injunctive relief on the above claims. Id. at ¶¶ 9.1 - 9.5.

The State of Florida asserts federal jurisdiction pursuant to Title 28, United States Code, Section 1331[2] and

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[1] Plaintiffs have voluntarily dismissed with prejudice their claims against defendants Zachy's Wine And Liquor, Ind., Stafford's Fine Wine And Specialty Co,. and Castlerock Wine Corp., d/b/a St. Helena Wine Merchants. *See* Documents 23, 27 and 28.

[2] The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331.

1337 (a)[3]. Document 2 at ¶ 2.2. Florida contends that its claim to compel defendants to comply with the alcohol beverage licensing requirements under Florida law (Count I) arises under Section 2 of the Twenty-First Amendment to the Constitution[4] and Title 27, United States Code, Sections 121 ("Wilson Act")[5] and 122 ("Webb-Kenyon Act")[6]. Document

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[3] The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies. 28 U.S.C. § 1337 (a).

[4] The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. U.S. Const. amend. XXI, § 2.

[5] All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise. 27 S.S.C. § 121.

[6] The shipment or transportation in any manner or by any means whatsoever or any ... intoxicating liquor or any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is

2 at ¶ 2.1. Florida avers that the court has supplemental jurisdiction over the claims alleged in Counts II through V pursuant to Title 28, United States Code, Section 1367 (a). Id. at ¶ 2.2.

Defendants move to dismiss the complaint for lack of subject matter jurisdiction alleging that the claims alleged in the complaint do not arise under the Constitution, laws, or treaties of the United States or any Act of Congress regulating commerce. Document 9 at p. 5. Defendants maintain that the allegations of the complaint are for violations of Florida's Beverage Law, Chapter 561.01 *et seq.*, Florida Statutes, and that neither the Twenty-First Amendment, the Wilson Act, nor the Webb-Kenyon Act create a right of action to recover for violations of the same. Id. at ¶ 4. Defendants also argue that Counts II through IV should be dismissed pursuant to the Tax Injunction Act, Title 28, United States Code, Section 1341. Id. at ¶ 5.

II. *Analysis:*

The central issue before the court is whether the Twenty-First Amendment, the Wilson Act, or the Webb-Kenyon Act, collectively, or in and of themselves, create a right of action on behalf of the State of Florida to sue in

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intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject tot he jurisdiction thereof, is hereby prohibited. 27 U.S.C. § 122.

federal court to compel defendants to comply with licensing requirements of Florida's Beverage Law. Like the parties, the court's research could find only one case which addressed the issue.[7] In that case, Georgia v. Wenger, 94 F.Supp. 976, 981 (E.D.I11. 1950) *aff'd* 187 F.2d 285 (7th Cir.) *cert. denied* 342 U.S. 822 (1951), the State of Georgia sued a resident of Illinois in a civil action in federal court to recover damages resulting from a conspiracy to violate the state's revenue laws. "The complaint alleged that defendant, with certain residents of the State of Georgia, conspired to ship and did ship and sell 79,000 gallons of intoxicating liquors from Illinois to the residents of Georgia, and that no warehouse fees or taxes imposed by the laws of Georgia were paid thereon...." 187 F.2d at 285. The State of Georgia asserted that federal jurisdiction existed pursuant to the Twenty-First Amendment and the Webb-Kenyon Act. The defendant moved to dismiss the complaint for, among other things, lack of federal jurisdiction. The district court ruled that neither the Webb-Kenyon act nor the Twenty-First Amendment conferred a civil remedy to recover damages for the transportation of liquor into the state in violation of state law. 94 F.Supp. at 981.

> By history and by judicial interpretation in the light of the history the intended scope and purpose of each [the Twenty-First Amendment and the Webb-Kenyon Act] is to

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[7] Most of the cases reviewed by the court concerned suits contesting the validity of state legislation governing the transportation, importation or regulation of liquor.

> divest liquor in interstate commerce of its interstate character so as to deprive it of all immunity from state control. Neither serves to give the states enforceable civil rights but only serves an enabling authority for broader state legislation relating to intoxicants.
>
> ***
>
> The states... having legislated to that end, any rights accruing to the states whether in nature of a civil remedy or criminal action have their origin not in the Webb-Kenyon Act or in the Twenty-first Amendment that gave... them the power to legislate but in the legislation enacted in exercise of the power.

Id. at 94 - 95. On appeal, the Seventh Circuit affirmed the district court's holding concluding that no cause of action "arose under the [Twenty-First} Amendment or under the Webb-Kenyon Act." 187 F.2d at 287.

The State of Florida argues that the decision in Wenger is inapplicable to this case. Unlike the State of Georgia in Wenger, the State of Florida asserts that it is not alleging federal jurisdiction pursuant to the Twenty-First Amendment or the Wilson and Webb-Kenyon Acts to recover *damages* for defendants' violations of Florida's Beverage Law; rather, Florida says, federal jurisdiction exists pursuant to the above cited authority for *injunctive relief* to compel defendants to comply with the licensing requirements of Florida's Beverage Law. Document 20 at 8. The State of Florida argues that the Twenty-First Amendment and the Wilson and Webb-Kenyon Acts imply a federal right of action on the part of the State of Florida to compel defendants to comply with Florida law.

In evaluating a claim that a statute creates an implied right of action, the Supreme Court has articulated that the focus must be on the intent of congress when it enacted the statute in question. Transamerica Mortg. Advisors, Inc., v. Lewis, 444 U.S. 11, 15 (1979) (*"what must ultimately be determined is whether Congress intended to create the ... remedy asserted...."*); Daily Income Fund, Inc. v. Fox., 464 U.S. 523 (1984). Among the factors considered in discerning congressional intent, are (1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted, (2) whether there was any indication of Congressional intent to deny or create a right of action (3) whether implication of a right of action is consistent with the underlying purpose of the statute, and (4) whether the matter is traditionally one relegated to the states. Cort v. Ash, 422 U.S. 66, 78 (1975); Thompson v. Thompson, 484 U.S. 174, 179 (1988).

Against this backdrop, the court determines that neither the Twenty-First Amendment, the Wilson Act, nor the Webb-Kenyon Act, collectively, or in and of themselves,[8] create a right of action for suit in federal court to compel compliance with state law. For one, the matter of regulating

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[8] Judicial interpretation has provided the Twenty-First Amendment, the Wilson Act, and the Webb-Kenyon Act with the same scope, meaning and purpose. Craig v. Boren, 429 U.S. 190, 205 (1976) (*"[t]he wording of § 2 of the Twenty-first amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes).*

the flow of alcohol is traditionally one relegated to the states. James Clark Distributing Co. v. Western Md. Ry Co., 242 U.S. 311, 332 (1917) (*prior to prohibition states possessed extraordinary police power over alcohol);* In the License Cases, 47 U.S. (5 How.) 504, 579 (1847) (*recognizing broad authority in state governments over trade in alcoholic beverages within their borders).* Second, the history surrounding the Wilson and Webb-Kenyon Acts and the Twenty-First Amendment demonstrate that the purpose behind the passage of the two Acts and the Amendment was to reinvigorate *the state's role* in alcohol regulation and move away from federal regulation of the same. Boren, 429 U.S. at 205 - 06; Duckworth v. Arkansas, 314 U.S. 390 (1941) (*purpose of the Webb-Kenyon Act was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor contrary to state law);* United States v. State Tax Comm'n of Miss., 412 U.S. 363 (1973) (*amendment was intended to free the state of traditional commerce clause limitations when the state restricts the importation of intoxicants destined for use, distribution or consumption within its borders*); W.D.C., Inc. v. City of Jacksonville, 710 F.Supp. 782, 785 (M.D.Fla. 1989) *(Wilson Act enacted to provide express authority to the states to regulate imported alcohol) (Twenty-First Amendment returned power of regulating alcohol to the states and added power over interstate commerce not previously possessed)*; Battipaglia v., New York State Liquor Auth., 745 F.2d 166 (7th Cir. 1984) *(amendment was designed to end federal government control of drinking*

habits of all citizens and to place control of alcoholic beverages in the states; fulfillment of the latter required that full authority be given to the states to deal with the subject of intoxicating liquors free from any commerce clause concerns) cert. denied 470 U.S. 1027 (1985). Moreover, the intent behind the passage of the Acts and the Twenty-First Amendment support that Congress did not intend to create a federal right of action. The Webb-Kenyon act originally contained a provision providing for federal enforcement of its terms; this federal enforcement section, however, was repealed by Congress in 1936 leaving no provision, either civil or criminal, for enforcement under the act. Wenger, 94 F.Supp. at 980. Likewise, the Twenty-First Amendment, as originally proposed, contained three substantive sections, the third of which provided:

> Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold.

76 Cong.Rec. 4138 (1933). "Section three was deleted because of Congressional concern that its grant of concurrent power to regulate liquor to Congress would be construed to support the supremacy of federal regulation of importation of liquor to the states." Castlewood Intern. Corp. v. Simon, 596 F.2d 638, 642 (5th Cir. 1979); W.D.C., Inc., 710 F.Supp. at 788 - 89.

III. *Conclusion*:

Congress passed the Wilson and Webb-Kenyon Acts and proposed the Twenty-First Amendment in an attempt to place the regulation of alcoholic beverages back with the states. In this sense, the Acts and Amendment do not create a federal right of action but serve as enabling authority for the states to regulate the flow of alcohol into their respective borders without federal commerce clause concerns. The State of Florida has not alleged a claim arising under the Constitution, laws, treaties of the United States or under any act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies; rather Florida has alleged claims seeking reprieve for violations of *state law*. Thus, this court does not have federal subject matter jurisdiction and this case must be dismissed.

Accordingly it is ORDERED:

1. Defendants motion to dismiss (document 9) is GRANTED.

2. This cause is DISMISSED for lack of subject matter jurisdiction. The clerk shall enter judgment accordingly.

DONE AND ORDERED this 2nd day of May, 1996.

s/
WILLIAM STAFFORD
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

STATE OF FLORIDA, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES and TOBACCO, and ROBERT BUTTERWORTH, ATTORNEY GENERAL OF THE STATE OF FLORIDA, DEPARTMENT OF LEGAL AFFAIRS,

vs. Case No. TCA 95-40462-WS

ROCHAMBEAU WINES AND LIQUORS, INC., THE CALIFORNIA WINE CLUB, PASSPORT WINE CLUB, WINE CLUB SANTA ANA, INC., AND OTHER MAIL-ORDER SHIPPERS OF ALCOHOLIC BEVERAGES INTO FLORIDA,

JUDGMENT

Pursuant to and at the direction of the Court, it is

ORDERED AND ADJUDGED that this action be **DISMISSED** for lack of subject matter jurisdiction.

Dated May 3, 1996, at Tallahassee, Florida.

ROBERT A. MOSSING, CLERK
s/_____
By Deputy Clerk: PAM KUMINKOSKI

ENTERED ON DOCKET 5/3 BY PK
(Rules 58 & 79(a) FRCP or 32(b)(1) & 55 FRCRP)
Copies mailed to: Klein, Taylor, Dean, Wright, Cohen, Goldstein, Hartmann, Young, COB 1996

IN THE CIRCUIT COURT FOR THE SECOND JUDICIAL CIRCUIT, IN AND FOR LEON COUNTY, FLORIDA

STATE OF FLORIDA, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, DIVISION OF ALCOHOLIC BEVERAGES AND TOBACCO, AND ROBERT BUTTERWORTH, ATTORNEY GENERAL OF THE STATE OF FLORIDA, DEPARTMENT OF LEGAL AFFAIRS

Plaintiffs,

v. **CASE NO: 96-3602**

SAM'S WINES & LIQUORS, SOUTH AFRICAN WINE CLUB, INTERNATIONAL HOUSE OF WINE & CHEESE, AND OTHER MAIL-ORDER SHIPPERS OF ALCOHOLIC BEVERAGES INTO FLORIDA,

Defendants.

_____/

AMENDED
ORDER GRANTING MOTION TO DISMISS

THIS MATTER came to be heard on Motions to Dismiss filed by Sam's Wines & Liquors, Inc. and South African Wine Club and the Court, having heard argument of counsel and being otherwise fully advised in the premises, hereby finds:

1. In order for a nonresident defendant to be subject to the jurisdiction of a Florida court, two criteria must be met: first, the complaint must set forth sufficient

jurisdictional facts to bring the defendant within the purview of Florida's long-arm statute, F.S. 48.193 and, secondly the defendant must possess certain minimum contacts with the state of Florida sufficient to satisfy the Fourteenth Amendment due process requirement of the United States Constitution. Flight International Aviation Training Center v. Rivera, 651 So.2d 1265, 1266 (Fla. 1DCA 1995).

2. It is undisputed that Sam's Wines & Liquors is an Illinois corporation with its sole place of business at 1000 West North Avenue, Chicago, Illinois. Sam's owns no real or tangible property in the state of Florida, does not have any employees or agents within the state of Florida and does not operate, conduct or transact business in Florida. Sam's utilizes telephone number (312)664-7037 for the receipt of telephone orders and, with any such telephone orders taken, Sam's purchase and shipping policy clearly reflects that title to the product passes to the purchaser in Illinois. See F.S. 672.401(2). Sam's is alleged to have engaged in a single sale of alcoholic beverages involving a resident of the state of Florida.

3. It is undisputed that South African Wine Club is a sole proprietorship located at Huntington Beach, California. It has no offices, employees or agents in Florida. South African Wine Club's only connection with Florida is when individuals in the state call or write to South African Wine Club's office in California to order wine. Title to any wines so ordered from South African similarly passes to the customer in California.

4. It is undisputed that South African has done approximately $3,500 in business in Florida, less than .5% of South African's total revenues for the period. It has not actively solicited Florida customers having twice chosen to advertise in national wine publications and once in a newsletter directed towards South Africans living in the United States. The only time it intentionally advertised in

Florida was in connection with a newsletter published by South Africans living in Florida in which newsletter, South African Wine Club bought one advertisement.

5. An agent from the Division of Alcoholic Beverages and Tobacco placed an order with Sam's Wines for two 750 milliliter bottles of Scotch which was paid for by a credit card transaction in which title passed in the state of Illinois. The products were subsequently delivered by purchaser's agent, to purchaser in Leon County.

6. An agent for the Division similarly purchased three 750 milliliter bottles of wine from South African for $25 in a credit card transaction in which title passed in California with the wines subsequently shipped by purchaser's agent, to purchaser in Leon County.

7. It is found based upon the complaint and the motions to dismiss that insufficient jurisdictional facts have been alleged to place defendant South African Wines and Sam's Wines & Liquors within the purview of Florida's long-arm statute, F.S. 48.193.

8. It is further found based upon the complaint and motions to dismiss that defendants South African Wines and Sam's Wines lack the necessary minimum contacts with the state of Florida sufficient to satisfy the Fourteenth Amendment due process requirement of the United States Constitution.

9. Finally, even if personal jurisdiction over the defendants existed, which it does not, based upon the complaint and motions to dismiss the Court finds that under the rationale of Department of Revenue v. Share International, Inc., 676 So.2d 1363 (sic 1362) (Fla. 1996) that the Defendants South African Wines and Sam's Wines & Liquors lack the "substantial nexus" with the state of Florida which must exist as a necessary precondition to the

imposition of a requirement to collect and remit Florida excise taxes.

Based upon the foregoing findings, it is hereby

ORDERED AND ADJUDGED that:

1. Defendant Sam's Wines & Liquors' and South African Wines' Motions to Dismiss be and the same are hereby GRANTED with prejudice; and

2. Having granted the Motion to Dismiss, this case shall be and the same is hereby dismissed.

DONE AND ORDERED *nunc pro tunc* this 8th day of December, 1997, at Tallahassee, Leon County, Florida.

/s/
GEORGE S. REYNOLDS, III
CIRCUIT JUDGE

Copies furnished to:

Thomas A. Klein, Esq.
Eric J. Taylor, Esq.
Robert Wright, Esq.
J. Riley Davis, Esq.
Harold F. X. Purnell, Esq.
Mort Siegel, Esq.

Supreme Court, U.S.
FILED
MAR 5 1998
OFFICE OF THE CLERK

(2)

No. 97-1263

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

STATE OF FLORIDA, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, *et al.*,

Petitioners,

v.

ROCHAMBEAU WINES AND LIQUORS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENTS CALIFORNIA WINE CLUB, PASSPORT WINE CLUB, AND WINE CLUB SANTA ANA IN OPPOSITION

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18 pp

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QUESTION PRESENTED

Whether there is an implied federal cause of action under the Webb-Kenyon Act, 27 U.S.C. § 122?

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding.

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COUNTERSTATEMENT OF THE CASE

Respondents are "wine clubs" located in California who are engaged in the retail sale of wine products and allegedly failed to comply with the State of Florida's "three-tier" alcoholic beverage law and taxation scheme. Contrary to the statements made by Petitioners, Respondents are not "illegal bootleggers" and no court has ever held that their actions violate Florida law.

Florida's "three-tier" scheme provides that alcoholic beverages imported into Florida may be shipped only to an in-state licensed manufacturer or distributor. Fla. Stat. § 561.54. Florida further provides that only licensed vendors physically located in Florida are allowed to sell alcoholic beverages at retail, Fla. Stat. § 561.14, or make deliveries away from their place of business, Fla. Stat. § 561.57.

After establishing a "sting" operation, through which Petitioners allegedly obtained wine shipped by Respondents to state agents in Florida, Petitioners brought the instant action in the United States District Court for the Northern District of Florida. Petitioners filed a five count complaint, exclusively alleging violations of Florida law and seeking both monetary damages and injunctive relief.[1]

Petitioners asserted that subject matter jurisdiction was conferred on the basis of 28 U.S.C. §§ 1331 and 1337(a), based on their allegation that the action arose under "Art. 1, Sec. 8, Cl. 3, United States Constitution

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[1] As noted by the Court of Appeals, four of the five counts sought monetary damages.

("Commerce Clause"); Amend. 21, Sec. 2, United States Constitution, and 27 U.S.C. §§ 121 (the Wilson Act) and 122 (the Webb-Kenyon Act)." Petitioners alleged that their state law claims were before the court based on principles of supplemental jurisdiction. Although Petitioners do not disclose this in their petition to the Court, they have since abandoned their reliance on the Twenty-First Amendment and the Wilson Act as a basis for jurisdiction. *See* Petitioners' Appendix, at v.

On May 3, 1996, the district court dismissed the action for lack of subject matter jurisdiction, holding that neither the Wilson nor Webb-Kenyon Acts, nor the Twenty-First Amendment create a federal cause of action on behalf of Petitioners, but rather, serve as enabling authorities for the States to regulate the flow of alcohol within their borders. As Petitioners had alleged no federal claims in their complaint, the district court therefore dismissed the action.

Petitioners timely appealed to the United States Court of Appeals for the Eleventh Circuit. On October 24, 1997, the Court of Appeals affirmed the decision of the district court. Petitioners' Appendix, at i.

In its opinion, the Court of Appeals examined longstanding precedent of the Seventh Circuit, the only relevant precedent, which held that there was no implied cause of action under the Webb-Kenyon Act. *Georgia v. Wenger*, 94 F. Supp. 976 (E.D. Ill. 1950), *aff'd.*, 187 F. 2d 285 (7th Cir.), *cert. denied*, 342 U.S. 822 (1951). The Court of Appeals found *Georgia v. Wenger* directly "on point." Surprisingly, Petitioners do not cite or discuss *Georgia v. Wenger* in their petition.

In addition to examining *Georgia v. Wenger*, the Court of Appeals applied this Court's precedent,

established in *Cort v. Ash*, 422 U.S. 66 (1975) and its progeny, in order to determine whether there is an implied cause of action under the Webb-Kenyon Act. Petitioners do not cite or discuss *Cort v. Ash* and its progeny either.

The Court of Appeals examined and applied all four factors of the *Cort v. Ash* test, including the legislative history of the relevant statutes and constitutional amendments, before concluding that Petitioners had no implied federal cause of action under the Webb-Kenyon Act. Accordingly, the Court of Appeals affirmed the decision of the district court.

REASONS FOR DENYING THE WRIT

Other than a futile attempt to identify a non-existent conflict, Petitioners have advanced none of the compelling reasons established by this Court for the granting of review upon certiorari.

Petitioners make no attempt to argue that the Court of Appeals did not apply the correct precedent established by this Court in determining whether or not an implied federal cause of action exists under the Webb-Kenyon Act. Petitioners merely state that they "believe that the Court of Appeals did not understand the import of the situation and read too narrowly this Court's private right of action case law...." Petitioners' Brief at 9. Reading a properly stated rule of law "too narrowly" is not a basis for granting certiorari.

Moreover, the Court of Appeals conducted a detailed examination of this Court's precedent and

addressed each of the arguments raised by Petitioners below. Certiorari is not a vehicle for rehearing.[2]

Surprisingly, Petitioners argue that a conflict exists between the circuit courts based upon a eighty-three year-old decision, *West Virginia v. Adams Express Co.*, 219 F. 794 (4th Cir. 1915), that **never discusses the issue**, much less does it hold, that an implied federal cause of action exists under the Webb-Kenyon Act. *Adams Express Co.* has never been cited by any court for this proposition in the past eighty-three years. *Adams Express Co.* is clearly not the "real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals" required to grant certiorari. *Layne & Bowler Corporation v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). In fact, there is no conflict whatsoever.

The Seventh Circuit, in *Georgia v. Wenger*, directly and unambiguously held that a state has no implied federal cause of action under the Webb-Kenyon Act. The Seventh Circuit affirmed the district court which held the same. The only district court ever to address this issue prior to the instant case also has held the same. *Query v. 206 Cases of Assorted Liquor*, 49 F. Supp. 693 (W.D. S.C. 1943). **No court** has ever held the contrary.

For forty-six years *Georgia v. Wenger* was the only appellate precedent. It apparently produced no drastic results as it went unchallenged until now. The Eleventh Circuit has now joined the Seventh Circuit based on this

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[2] Point B of the petition, discussing the power of the States to regulate liquor, was not an issue before the Court of Appeals, and thus is irrelevant to the question presented by this petition. See Petitioners' Brief at 10-19.

Court's modern precedent, producing two appellate opinions with identical results, despite being forty-six years apart. One cannot imagine a more unattractive case for granting certiorari.

Petitioners' remaining reason for granting certiorari, that "the states' ability to regulate the interstate shipment of alcoholic beverages has been greatly undermined by the decisions below," has no basis in fact or law. As the Court of Appeals noted, "[t]he State offers no clear reason why it needs a federal forum," finding that "states have been enforcing their liquor laws against out-of-state distributors in state courts for years."(citations omitted).[3] Petitioners' Appendix, at xix. *See also Ivey v. Bacardi Imports, Inc.*, 541 So.2d 1129 (Fla. 1989); *James B. Beam Distilling Co. v. State*, 259 Ga. 363, 382 S.E. 2d 95 (Ga. 1989), *reversed*, 501 U.S. 529 (1991), *appeal after remand*, 437 S.E. 2d 782 (1993), *cert. denied*, 513 U.S. 1056 (1994); *All Brand Importers, Inc. v. Department of Liquor Control*, 213 Conn. 184, 567 A.2d 1156 (Conn.

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[3] Respondents object to Petitioners' characterization of the state court proceeding cited at note 1 of the Petition. Petition, at 7 n.1. Petitioners incorrectly state that the state court ruled that it did not have "'personal jurisdiction' over the Respondents." Petition at 9. Respondents are not parties to the state court proceeding. Furthermore, the trial court order in that proceeding demonstrates that it is a straightforward personal jurisdiction case, wholly unrelated to the question presented here. Petitioners' Appendix, at xxxii. In that state court proceeding Petitioners sought to "sting" businesses who, unlike some of their purported customers, simply do not have "minimum contacts" with the State of Florida. It is hard to believe that Petitioners are contending that they are incapable of bringing a proper case in the state courts of Florida in conformity with the 14th Amendment to the United States Constitution.

1989); *Division of Alcoholic Beverages and Tobacco, Department of Business Regulation v. McKesson Corp., et al.*, 524 So.2d 1000 (Fla. 1988), *rev'd on other grounds*, 496 U.S. 18 (1990); *Schieffelin & Co. v. Department of Liquor Control*, 194 Conn. 165, 479 A.2d 1911 (Conn. 1984); *Williams v. Commonwealth*, 190 Va. 280, 56 S.E. 2d 537 (Va. 1949); *Oregon Liquor Control Comm'n v. Coe*, 163 Or. 646, 99 P.2d 29 (Or. 1940); *GMAC v. State*, 11 So.2d 482 (Fla. 1943); *James B. Beam Distilling Co. v. Department of Business Regulation, Division of Alcoholic Beverages and Tobacco*, 530 So. 2d 450 (Fla. 1st DCA 1988); *Miller Brewing Co. v. Florida Department of Business Regulation, Division of Alcoholic Beverages and Tobacco, et al.*, 527 So.2d 891 (Fla. 1st DCA 1988); *Somerset Importers, Ltd. v. Department of Business Regulation, Division of Alcoholic Beverages & Tobacco*, 428 So.2d 679 (Fla. 1st DCA 1983); *Anheuser-Busch, Inc. v. Department of Business Regulation, Division of Alcoholic Beverages and Tobacco*, 393 So.2d 1177 (Fla. 1st DCA 1981); *see also Belk-James, Inc. v. Nuzum*, 358 So.2d 174, 176 n.5 (Fla. 1978); *Faircloth v. Mr. Boston Distiller Corp., et al.*, 245 So.2d 240 (Fla. 1970); *Guiseppe Pizzeria v. Department of Business Regulation, Division of Alcoholic Beverages and Tobacco*, 472 So.2d 1331 (Fla. 3d DCA 1985).

One is indeed puzzled by the purported interest of Petitioners in seeking to have the federal courts become the interpreters of the liquor laws of the fifty states, a field traditionally left to the States. There simply is no reason for the Federal courts to assume the burden of overseeing the vast arena of state regulation of alcoholic beverages. *See, e.g.*, Chapter 561, Fla. Stat. (Beverage Law: Administration); Chapter 562, Fla. Stat. (Beverage Law:

Enforcement); Chapter 563, Fla. Stat. (Beer); Chapter 564, Fla. Stat. (Wine); Chapter 565, Fla. Stat. (Liquor); Chapter 567, Fla. Stat. (Local Option Elections); Chapter 568, Fla. Stat. (Intoxicating Liquors in Counties Where Prohibited). As the Court of Appeals noted, and as the cases cited above demonstrate, there is no indication that the States have been unable to pursue their remedies in state courts. Perhaps Petitioners' real concern here is simple forum shopping, since Florida state courts have twice held Florida's Beverage Laws to be unconstitutional and have recently held unconstitutional Florida's attempt to tax goods shipped by mail order. *See Department of Revenue of the State of Florida v. Share International, Inc.*, 676 So.2d 1362 (Fla. 1996), *cert. denied*, 117 S.Ct. 685 (1997); *Ivey v. Bacardi Imports Co.*, 541 So.2d 1129, 1140 (Fla. 1989); *McKesson Corp., supra*, 524 So.2d 1000 (Fla. 1989), *rev'd on other grounds*, 496 U.S. 18 (1990). Such a concern, however, is not a reason for granting certiorari in this case.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF FLORIDA, DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, *et al.*,
Petitioners,

v.

ROCHAMBEAU WINES AND LIQUORS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF THE NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION AND THE NATIONAL CONFERENCE OF STATE LIQUOR ADMINISTRATORS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of this Court, the National Alcohol Beverage Control Association (NABCA) and the National Conference of State Liquor Administrators (NCSLA) respectfully move this Court for leave to file the attached brief amici curiae in support of Petitioners.[1]

NABCA is a Wyoming non-profit corporation whose members are the 18 states (Alabama, Idaho,

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[1] Petitioners have consented to the filing of this brief and their letter of consent has been filed with the Clerk of the Court. Respondents have not consented.

Iowa, Maine, Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia and Wyoming) which directly control the distribution and sale of alcohol beverages within their borders under the Twenty-First Amendment through government-operated wholesale and, in some cases, retail outlets. In addition to the enumerated states, Montgomery County, Maryland is an Active Member of NABCA and the North Carolina Association of ABC Boards is a Participating Member. These jurisdictions are commonly referred to as "control" states.

NABCA member jurisdictions not only operate wholesale and retail establishments, they also perform licensing and regulatory functions with regard to private alcohol beverage distribution channels within their jurisdiction. These jurisdictions are also responsible for the enforcement of laws pertaining to alcohol beverage distribution.

NCSLA is an unincorporated organization which represents the remaining 32 states, often called "open" or "license" states. In these jurisdictions, the state government acts only in a licensing, regulatory and enforcement capacity, have chosen, pursuant to the Twenty-First Amendment, to permit the distribution of alcohol beverages to be accomplished entirely by the private sector.

Thus, together, the NABCA and NCSLA member jurisdictions represent all 50 states.

Because the illegal interstate distribution of alcohol beverages is approaching $1 billion annually, according to some estimates, and because states have been frustrated in their efforts to enforce their laws

through jurisdictional challenges to such enforcement efforts, the amici have a great interest in the outcome of this matter.

Respectfully submitted,

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March 5, 1998

QUESTION PRESENTED

Whether a State has a right of action in a federal court to enforce the prohibitions contained in the Webb-Kenyon Act, 27 U.S.C. § 122, against an out-of-state seller whose direct shipments to consumers within the State violate that State's laws?

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BRIEF OF THE NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION AND THE NATIONAL CONFERENCE OF STATE LIQUOR ADMINISTRATORS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

The National Alcohol Beverage Control Association (NABCA) and the National Conference of State Liquor Administrators (NCSLA), by their attorney,[1] file this brief as amici curiae supporting the position

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[1] Counsel for the amici was the sole author of this brief. No party other than the amici made a monetary contribution to the preparation and submission of this brief.

of the Petitioners and respectfully urge this Court to overturn the judgment of the United States Court of Appeals for the Eleventh Circuit in *Florida Department of Business Regulation v. Zachy's Wine and Liquor, Inc., et al.*, 125 F.3rd 1399 (11th Cir. 1997).

INTEREST OF THE AMICI CURIAE

The interest of the amici is detailed in the motion accompanying this brief.

STATEMENT OF THE CASE

Alcohol beverages constitute one of the most highly regulated lawful commodities available in commerce. The American experience with this product includes a history of taxation and regulation dating back to colonial times. With few exceptions—the federal excise tax and the failed experiment of Prohibition being the prime examples—most of the regulation of alcohol beverages has taken place at the state level.

While much of the regulation has taken place pursuant to the Twenty-First Amendment, which repealed the Eighteenth Amendment and gave states specific authority to regulate the distribution and sale of alcohol beverages within their borders, state regulation of the product, particularly with regard to the manner and method of sale, predated the national Prohibition experience by many years.

In fact, states led the effort to outlaw the sale and distribution of alcohol beverages and while no state is totally "dry" today, many have areas in which alcohol beverages may not be lawfully sold.

The resulting "patchwork quilt" of state regulation was recognized as a problem more than a century ago when Congress adopted the so-called Wilson Act,

sometimes referred to as the "Original Packages Act." [2] This law had its flaws, however, and Congress subsequently adopted the Webb-Kenyon Act [3] which acted to divest alcohol beverages of their interstate commerce protection where the interstate shipment occurred in violation of state laws.

Acting pursuant to the Webb-Kenyon Act, the State of Florida commenced an action in United States District Court to permanently enjoin several out-of-state shippers from shipping alcohol beverages directly to consumers in the state in contravention of state law, which totally prohibits such shipments. However, the District Court, in *State of Florida, et al. v. Rochambeau Wines and Liquors, Inc., et al.*, No. 95-40462-WS (N.D.Fla. 1996) dismissed the state's complaint for lack of subject matter jurisdiction. The decision was upheld by the Eleventh Circuit. *Florida Department of Business Regulation v. Zachy's Wine and Liquor, Inc.*, 125 F.3rd 1399 (11th Cir. 1997). The State of Florida has filed a Petition for Certiorari asking this Court to review that decision.

SUMMARY OF ARGUMENT

In seeking to enjoin the unlawful interstate shipment of alcohol beverages into its borders, the State of Florida is merely seeking to insure compliance with its statutorily-recognized right to regulate the distribution and sale of such products. Denying states the ability to enforce their laws in federal court will subject them to the very real possibility that there may well be no venue available in which to litigate issues of compliance with state law, thus leaving out-

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[2] 27 U.S.C. § 121.

[3] 27 U.S.C. § 122.

of-state sellers free to violate state taxation and distribution law with impunity.

While the issue of state access to federal courts under the Webb-Kenyon Act has not been extensively litigated, the Eleventh Circuit opinion conflicts with an earlier holding by the Fourth Circuit and would, if allowed to stand, effectively nullify the Congress' action in adopting the Webb-Kenyon Act.

ARGUMENT

I. THE STATES' ABILITY TO EFFECTIVELY ENFORCE THEIR LAWS REGARDING DIRECT INTERSTATE SHIPMENT OF ALCOHOL BEVERAGES HAS BEEN DRASTICALLY IMPEDED BY THE ELEVENTH CIRCUIT DECISION

As indicated, it has long been recognized, both in the Twenty-First Amendment and elsewhere, that states have the authority to control the distribution and sale of alcohol beverages within their borders. Recognizing the ease with which alcohol beverages could be transported across state lines—in violation of state law in many cases—Congress long ago divested alcohol beverages of the interstate commerce protection accorded to all other lawful products.

To hold that Congress divested this protection and then left no means for the enforcement of state laws regulating interstate shipment makes a mockery of the initial Congressional action. Indeed, according to one Congressional supporter of the Webb-Kenyon Act

> The purpose (of the Act) is to take the protecting arm of the Federal Government, by virtue of the interstate commerce clause of the Constitution, from around the illicit dealers in liquors, and is to allow the States which have passed

> policy regulations restricting or forbidding the sale of liquor to better enforce those regulations.[4]

Another Congressional supporter noted that "(t)he United States Government should aid in the preservation of the laws of the States rather than in their violation."[5]

Consider the enforcement options open to states should the decision of the Eleventh Circuit be upheld. If states are not able to utilize the federal court system to halt alcohol beverage shippers from violating state laws, states would have to seek to stem the growing illegal interstate flow of alcohol beverages—estimated in some quarters to be approaching $1 billion annually[6]—by seeking out carriers, such as United Parcel Service or Federal Express. But since much of the illegal interstate shipments are made in cartons not indicating the alcohol beverage contents of the package, such an effort would be ineffective. Nor could states effectively seek to enforce their laws against those state residents who receive the illegal interstate shipments. Again, this would be like looking for the proverbial "needle in a haystack."

Some would argue that the states can seek to have the federal Bureau of Alcohol, Tobacco and Firearms (BATF) enforce state law prohibitions or regulations regarding interstate alcohol beverage shipments. Critics of state action would note that BATF has made compliance with state laws, including those regulating interstate shipment, a condition of obtaining and retaining a so-called "basic permit," i.e., the right

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[4] 49 Congressional Record H2864 (daily ed. February 8, 1913).

[5] 49 Congressional Record H2840 (daily ed. February 8, 1913).

[6] W. John Moore, Sour Grapes on Capitol Hill, NATIONAL JOURNAL, November 29, 1997, at 2424.

to operate as an alcohol beverage producer or distributor.[7] But BATF's regulatory authority does not extend to brewers and retailers, so any BATF action would be discriminatory at best and, at worst, would not reach some of the major offenders in the illegal interstate alcohol beverage trade. Indeed, BATF itself filed an amicus curiae brief urging the Eleventh Circuit to allow states to enforce their own laws in federal court, stating that "Congressional enactments should not be interpreted in a manner that leaves them devoid of content." [8]

While in theory states could bring actions in state courts to enforce their prohibitions, that approach has thus far been less than successful. Florida [9] and Utah [10] have had enforcement efforts dismissed on personal jurisdiction grounds, and the defendant in a pending Missouri case [11] has cited extra-territorial activity as the major reason why it should not be adjudged to have violated state law.

These decisions are a reflection of the claims made by the illegal interstate alcohol beverage shippers, who claim that the product "sale" took place in the state where the shipper resides, that the consumer took title to the property in that foreign state and

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[7] See BATF Industry Circular 96-3, Direct Shipment Sales of Alcohol Beverages, February 11, 1997.

[8] Brief for Amicus Curiae United States of America before the Eleventh Circuit, at 9.

[9] *State of Florida, et al. v. Sam's Wines & Liquors, et al.*, Circuit Court for the Second Judicial Circuit, No. 96-3602.

[10] *The State of Utah v. Louis A. Amoroso, et al.*, Third Judicial District Court, Division II, No. 971002970-FS.

[11] *State of Missouri ex rel. Jeremiah W. (Jay) Nixon v. Beer Nuts, Ltd., d/b/a Hogs Head Beer Cellars*, Circuit Court of St. Louis City, No. 974-2076.

that the shipper merely acts as the agent for the consumer in arranging for the interstate shipment of alcohol beverages.

If state courts continue to recognize this "sham" transaction and deny state enforcement access on personal jurisdiction grounds, and if states are denied access to the federal court system under the Eleventh Circuit's rationale, the state prohibition against interstate direct shipment is a nullity.

NABCA and NCSLA submit that such a result should not be permitted.

II. THE DECISION OF THE ELEVENTH CIRCUIT CONFLICTS WITH A DECISION OF THE FOURTH CIRCUIT

By holding that the State of Florida did not have an implied right of access to the federal courts for the purpose of enforcing its laws regarding the illegal interstate shipment of alcohol beverages, the Eleventh Circuit placed itself in contradiction to a holding reached by the Fourth Circuit in *West Virginia v. Adams Express Co.*, 219 F. 794 (4th Cir. 1915).

In that case, the State of West Virginia sought to stop the illegal direct shipment of alcohol beverages from a seller in Ohio by seeking an injunction in state court against the carrier of the product. Adams Express was enjoined from violating the law by a state court, but then removed the matter to federal court, where a U.S. District Court judge dissolved the injunction and dismissed the suit.

However, the Fourth Circuit reversed, noting that

> The Webb-Kenyon Act is the result of a growing public conviction that it was an abuse of inter-

> state commerce that . . . liquor dealers in one state were protected in impairing or defeating the efforts of another state to root out or to minimize the evil of the use of liquor as a beverage.[12]

Adding that Congress had not seen fit to totally exclude alcohol beverages from interstate commerce, the Court found that Congress had rather intended to exclude alcohol beverages on condition that

> they shall not be transported by common carriers into particular states when such transportation would be especially injurious to the public interest, in that, when they reach the state, they will derange and make inefficacious the police measures for the control of intoxicants which the state has seen fit to adopt. The court can hardly find room to doubt that this qualified exclusion made in aid of the efforts of a number of states of the Union to combat one of the greatest evils of human life is founded on deep reason and enlightened public policy.[13]

Having found that the Webb-Kenyon Act was designed to aid states in their regulatory activities, the Fourth Circuit reversed the District Court decision and reinstated the injunction sought by the state.

Nowhere in the Fourth Circuit opinion is there a statement or an implication that the federal courts are not an appropriate forum for states to use in pursuing their efforts to halt the illegal interstate shipment of alcohol beverages. The Eleventh Circuit opinion, at 185, noted that the subject matter jurisdiction issue remains unclear. However, if, as the Eleventh Circuit also noted, the matter could be

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[12] *West Virginia v. Adams*, at 801.

[13] *West Virginia v. Adams*, at 803.

removed to the federal courts, it appears that there is no logical reason why the federal courts should not also be an appropriate forum for an action to be initiated.

CONCLUSION

For the reasons stated above, it is urged that this Court reverse the opinion of the United States Court of Appeals for the Eleventh Circuit and declare that, pursuant to 27 U.S.C. § 122, states have access to federal court for the purpose of enforcing state laws pertaining to the interstate shipment of alcohol beverages.

Respectfully submitted,

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